ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CA07-506

DAVID A. BYRD

APPELLANT

V.

DARLENE BYRD

APPELLEE

FEBRUARY 13, 2008

APPEAL FROM THE BOONE COUNTY CIRCUIT COURT
[NO. DR 2002-297-4]

HON. GORDON WEBB, CIRCUIT JUDGE

AFFIRMED

David A. Byrd appeals from an order of the Boone County Circuit Court granting to his ex-wife Darlene Byrd primary custody of the parties' two minor children. He argues that the custody award was not in the best interest of the children. We affirm.

This is the second time that the parties have appealed the award of custody. In an unpublished opinion handed down on November 16, 2005, we reversed a joint-custody award, holding that David and Darlene's manifest inability to cooperate in reaching "shared decisions" affecting the minor children made joint custody not in the children's best interest. In that opinion, we considered Darlene's denial of visitation as a justification for affirming the trial court's shared custody arrangement, but held that David's conduct in this area was not "appreciably better" than Darlene's. We further held that the court's effort to give David

"equal time" did not conform to the holding of *Calhoun v. Calhoun*, 84 Ark. App. 158, 138 S.W.3d 689 (2003), where this court held that custody awards are not made or changed to punish, reward, or gratify the desires of either parent.

Upon remand, the trial court conducted further hearings in which both parties presented evidence, including their own testimony. At the final hearing, the children's attorney ad litem recommended that Darlene be awarded primary custody. The trial court made detailed findings in a thirteen-page letter opinion.

The trial court found David and Darlene to be "highly fit" parents who had each established a "suitable home" for the children. However, it also found that the attorney ad litem had recommended that Darlene be awarded custody based on her having been the children's primary caretaker, a greater degree of involvement with the children by her extended family, and the children's involvement with Darlene's church. Additionally, the factors of moral fitness, stability, love and affection, and the children's special needs, taken together, weighed in favor of granting primary custody to Darlene. The court made specific findings in regard to these factors.

First addressing moral fitness, the trial court cited Darlene's enrollment of the children in formal religious training, which contrasted with David's "situation with the IRS" which indicated that "not all of Mr. Byrd's activities are 100% on the up and up." Further, David's unwillingness to promptly pay his child support, even when the issue of custody was pending, indicated that David was "simply willing to see what he can get away with," and raised a "serious question" as to David's willingness to diligently abide by the trial court's

orders. Next the trial court addressed the "stability" factor, which also weighed in favor of Darlene. The trial court found that the "residential and working circumstances" of Darlene were "substantially more stable over the long haul" than David's. The court noted David's history of marital instability—David was currently only ten months into his fourth marriage—and David's concomitant recent change of residence weighed against finding in his favor with regard to this factor. Further, the trial court found that while David's financial means appeared to be greater than Darlene's, Darlene had "learned to adapt and adjust" to her lesser circumstances, while David faced an "unstable and unresolved financial situation with regard to the IRS." Finally, considering under this rubric which party would be more likely to allow frequent contact with the non-custodial parent, the trial court recounted Darlene's denial of visitation early in the litigation. The trial court, however, concluded that Darlene had "learned her lesson" and specifically found testimony from her children from a previous marriage that she had cooperated with visitation was predictive of her future conduct in this area. Conversely, the trial court found that David's attitude toward his child support obligation left a "lingering doubt in the Court's mind" that David would fully cooperate in giving Darlene meaningful visitation.

The court found no clear advantage to either party in its consideration of the remaining factors. It found no substantial difference between the parties in their love and affection for their children. The court further noted that the "extreme youth" of the children rendered their stated preference "not an issue for consideration." Finally, the court found that both parties had made reasonable child-care provisions.

In his argument on appeal, David argues that the trial court erred in finding that it was the best interest of the children to award primary custody to his ex-wife Darlene. He contends that the trial court did not give "sufficient weight" to the fact that the record clearly shows that Darlene "defied an order of the trial court and unlawfully denied [him] visitation," while at the same time it demonstrates that he provided "extra" visitation. Likewise, David asserts that the trial court failed to give sufficient weight to the evidence that he presented concerning Darlene making disparaging statements about him in the presence of the children. He also asserts that he is in a better financial position to provide for the children, and the trial court failed to give proper weight to the testimony about his family relationships and support. Finally, he argues that the trial court's findings concerning his moral fitness were "ill-considered and not supported by the record." We find David's arguments unpersuasive.

In child-custody cases, the primary consideration is the welfare and best interests of the children involved; all other considerations are secondary. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). We review the case de novo, but we will not reverse a trial court's findings in this regard unless the findings are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* Due deference is given to the trial court's superior position to determine witness credibility and the weight to be given their testimony. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002).

With regard to David's argument that the trial court gave insufficient weight to the fact that Darlene had previously denied him court-ordered visitation, we addressed this contention in the first appeal and we held that there was not a significant difference in the parties' conduct with regard to visitation. Accordingly, our holding was law of the case. The law-of-the-case doctrine provides that the decision of an appellate court establishes the law of the case for the trial court upon remand and for the appellate court itself upon subsequent review and is conclusive of every question of law and fact previously decided in the former appeal. *Mathews v. Mathews*, 98 Ark. App. 30, ___ S.W.3d ___ (2007). We hold that the trial court was bound by our decision in *Byrd I*, not to ascribe to Darlene's conduct greater significance, and we are similarly constrained not to revisit the issue. Moreover, in the many months that have passed since Darlene's misdeeds, she demonstrated a willingness to abide by the trial court's visitation orders, and we cannot hold that the trial court's finding to this effect was clearly against the preponderance of the evidence.

We also reject David's assertion that the trial court failed to give sufficient weight to the evidence that he presented concerning Darlene making disparaging statements about him in the presence of the children. While it is true that evidence that a pattern of intentional parental alienation undertaken by one parent to ruin a child's relationship with the other can constitute grounds for awarding custody to the innocent parent, *Sharp v. Keller*, 99 Ark. App. 42, ___ S.W.3d ___ (2007), we do not believe that the evidence presented at the hearing rose to that level. In *Sharp*, the trial court found that the custodial parent was playing "evil games" against the non-custodial parent and that her actions were detrimental to her child.

It is never appropriate for one parent to disparage the other in the presence of their children. Nonetheless, we hold that the statements that David attributed to Darlene simply do not qualify as a campaign of parental alienation sufficient to justify reversal of the trial court's custody award.

Regarding David's assertion that he is in a better financial position to provide for the children, it is settled law that it is impermissible for a trial court to make a custody award based primarily on the relative financial condition of the parties. *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003). We also reject David's argument that the trial court failed to give proper weight to the testimony about his family relationships and support. While the trial court commended the support that David received from his new wife, it found, and we believe correctly, that the short duration of their marriage—only ten months—and David's past history of marital instability—she was his fourth wife—diminished the weight to be afforded her presence in the children's lives. We hold that this finding was not clearly against the preponderance of the evidence.

Finally, we are not persuaded by David's argument that the trial court's findings concerning his moral fitness were "ill-considered and not supported by the record." We hold that this finding rested on the trial court's assessment of David's credibility. We defer to the trial court on credibility determinations. *Ford v. Ford, supra*. Accordingly, the trial court was free to find not credible David's excuses for not promptly paying his child support and what he terms his "tax laxity." We affirm the trial court's finding.

For the foregoing reasons, we hold that the trial court did not err in granting primary custody to Darlene.

Affirmed.

BIRD and MARSHALL, JJ., agree.